Self-Governance
The Mandate of the Profession

CHALLENGES TO THE BRITISH COLUMBIA CORPORATION IN 1989

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In the past year or so, we have had numerous challenges, some in the normal sense of the word and some in court. I wasn't sure just what kinds of challenges I was invited to speak about, so I used my own judgement and chose those I feel will be of most interest to you. Whether or not I used good judgement will be your decision.

The Applied Science Technologists and Technicians of British Columbia, through a private member's bill, sought government approval for legislation authorizing "right to practise" in fields in which members were qualified to practise, and those areas of practise were to be determined by that Association's Executive. Along with the engineers and architects, the Corporation of Land Surveyors acted as an independent intervenor. Presentations were made to the Select Standing Committee on private member's bills. The Select Standing Committee recommended that the bill not proceed and thus it died a natural death. My view is that its ghost may reappear in the not-too-distant future.

In 1987, the Corporation became aware that an incorporated company, Infomap Services Incorporated, was providing building location surveys for mortgage purposes in and around Victoria.

They were charging substantially less than the fees outlined in the then current schedule of fees for land surveyors. No land surveyors were in any way connected or employed by Infomap.

One of the principals of Infomap Services Incorporated was one John R. Wannamaker. Mr. Wannamaker had retired after 39 years of employment in the engineering department of the City of Victoria. The plans of these mortgage certificates were signed by John R. Wannamaker, Member, Canadian Institute of Surveying and Mapping.

Our position was, of course, that he was not only holding himself out before the public as a land surveyor by showing himself on the plans as a member of the CISM but was indeed acting as a land surveyor by preparing these certificates. We examined numerous examples and, in some cases, there were opinions being given on described areas and natural boundaries. In others, no posts were in place on the subject parcels and he therefore used monuments on nearby lots or block corners in order to locate the boundaries of the lot.

I will not enter into the details of the arguments but will highlight the reasons given by Mr. Justice A.G. McKinnon. After comparing the procedures performed by Infomap with those used by land surveyors, the judge concluded that Infomap did not:

(a) locate monuments at the site and recreate the boundaries of the property;
(b) render opinions as to the location of boundaries; and,
(c) consider geographical or other evidence of the original position of the boundary when the lot was created.

He noted, in his reasons for judgement, that the defendants,

"do not carry out such procedures. Rather, they determine the location of the building after identifying and locating the corners of the lot and the survey monuments.".

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He further stated that Infomap:

"do not employ the use of a theodolite or transit compass as a surveyor does. They accept the existing monuments (established by land surveyors) and then use a tape measure to determine whether or not a building is located within the boundaries of the property. The defendants do not establish or define boundaries."

As I see it, the judge failed to understand that monuments are often not in place on the subject lot and that Infomap did, indeed, use a theodolite or, as he said, a transit compass.

Further, he did not consider the misleading style of the signature block.

Suffice it to say, we are in the process of an appeal to the decision and the appeal is scheduled to be heard on March 16 of this year.

We have received financial support for the appeal from your Association and, as well, from all but one of the other associations across Canada including the Association of Canada Lands Surveyors. We are most grateful for both financial and moral support as this matter could have serious ramifications throughout the surveying community.

Next I will deal with recent cases involving our schedule of fees.

In British Columbia, our Act has allowed us to pass bylaws, including provision for their enforcement and penalties for their infraction, with regard to, among other things, the tariff of fees for professional services.

Our bylaws require a 2/3 vote to become effective, and some years ago the membership authorized the following bylaw:

"10(f) Members shall observe the standards set out in the Tariff of Fees for Professional Services booklet, which the board is hereby empowered to revise, pass and publish as a bylaw of the Corporation from time to time, in order to ensure fair charges to the public, reasonable compensation to members, and the overall maintenance of professional standards. No member of the corporation shall make any fraudulent or exorbitant charge for his services."

The members of our Board of Management were of the opinion that the mandate given them was to enforce that bylaw and so they did. It is my opinion that, at all times, the Board acted in good faith and in the best interests of the Corporation.

Disciplinary proceedings for fee related violations were commenced only upon receiving a complaint and, in 1986, one member was found guilty and was censured, suspended for two days, and assessed partial costs. In 1987, another member was censured, suspended five days, and assessed full costs.

In 1987, a complaint was received and this is what I will hereinafter refer to as the "Mortimer" case. Mr. Mortimer was found guilty by the Board of Management and was censured, suspended five days, and assessed full costs.

This case hit the newspapers and television and radio news before, during, and after the formal hearing and, I assure you, it was not the Board's doing.

Mr. Mortimer appealed the decision to the courts and the court found that, because the Act did not expressly include the word "mandatory", the schedule of fees could not be enforced. The appeal was allowed and costs were assessed to the Corporation of Land Surveyors. I will review the reasons for the judge's decision later in this presentation.

While the Mortimer case was going on, so was another case involving two senior members of the Corporation and the tariff of fees.

This case arose when a complaint was received in February of 1986. The firm allegedly was charging less than the tariff amount for building location certificates, and was also allegedly offering to provide services for a fee less than the tariff rate.

After corresponding with the firm, the Board proceeded with charges and a summons was issued in June of 1986.

For clarity, I will call those charged the "surveyors", and the Corporation of Land Surveyors, the "Corporation".

The solicitor for the "surveyors" wrote to our solicitor in September of 1986 and advised that he had reported the charges laid by the "Corporation" against his clients to the investigation unit of the Competition Branch of Consumer and Corporate Affairs Canada. Apparently, the Competition people had had numerous complaints from both members of the Corporation and from the public.

On October 30, the "surveyors" filed an application for an interim injunction in the Supreme Court of British Columbia and in that petition, named Her Majesty the Queen in right of the Province of British Columbia, the Attorney General, the Corporation, the Board of Management of the Corporation and our secretary, Gordon Thomson.

In this petition, they asked for the following orders, paraphrased by me.

1. A declaration that the bylaw with respect to fees is of no force and effect and that it was invalid in the form in which it was enacted.
2. A declaration that the tariff of fees is of no force and effect.
3. An order prohibiting the Corporation et al from proceeding further with an inquiry into the conduct of those charged.
4. An interim injunction in respect of number 3.
5. Costs, and
6. Such further and other relief as the court may decide.

The matter was heard in November and an interim injunction restraining the Corporation from proceeding with a disciplinary hearing was granted, until such time as the court had dealt with the application of the "surveyors".

At the same time, the Court ordered that the "surveyors" must undertake, in writing, to abide by the Bylaws of the Corporation and, specifically, to strictly abide by Bylaw 10(f) and the Tariff of

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Fees for Professional Services until the matters have been heard.

On the same date {October 30} the "surveyors" also issued a Writ of Summons to the "Corporation", and everyone named previously, in which they asked the Court to declare, by reason of inconsistency with the Constitution of Canada, the following, again paraphrased by me, to be of no force and effect:

(a) Section 4(g) (the fee section of our Act);
(b) Section 5(1) (which allows the Corporation to delegate the passing of certain bylaws to the Board);
(c) Section 51 (which outlines the disciplinary powers of the Board);
(d) Section 52 (which requires the member to be summoned to the formal hearing and to be reasonably informed as to the matters he will be called on to answer);
(e) Section 52 (which allows the Board to instigate an inquiry); and,
(f) the Tarriff of fees.

The Writ went on to ask the Court to declare that;

(g) the rights of the "surveyors", as guaranteed by the Charter of Rights had been infringed upon and/or denied;
(h) that the Court should grant a permanent injunction restraining the "Corporation" from proceeding;
(i) an order to the same effect;
(j) an order for remedy pursuant to the Charter of Rights and Freedoms and for pecuniary judgement in favour of the "surveyors" in order to compensate them for the injuries, loss and damages suffered by them;
(k) general and special damages, including loss of income;
(l) costs; and,
(m) such other relief as the Court may determine, etc.

As you can see, the "Corporation" had now become the defendants.

In April of 1987, Her Majesty and the Attorney General filed a statement of defence and, shortly thereafter, so did the "Corporation".

Well, time went on and, on or about May 30, 1988, the "surveyors" filed notices of discontinuance and agreed to appear at a hearing into their professional conduct. The hearing was held on July 11, 1988 and one of the "surveyors" was found not guilty of all charges. The other was found guilty of one of three charges, and that was for quoting fees which were less than the fees prescribed by the tariff. The surveyor found guilty was not censured nor was he suspended, due to the long and emotional nature of this case. He was, however, assessed one-half of the costs of the proceedings.

The "surveyor" appealed the guilty verdict and the assessment of costs.

At this point, the "surveyor" and Mr. Mortimer were in the same position. Both had been found guilty and both had filed appeals.

Mr. Mortimer's appeal was the first heard. The Court found in favour of Mr. Mortimer and the judge, in his reasons for judgement, stated:

"The language regarding the tariff-making power of the Land Surveyors Act is not clear. In these circumstances, having regard to the kind of legislation involved, I do not think it unreasonable to hold that had the legislature intended to give the Corporation the power to set a mandatory minimum tariff, it would have done so in clear language. In my view, the 'loose' language of section 4(g), 'the tariff of fees' can in no way be interpreted to mean 'the minimum tariff of fees'. To intend the latter, it would be necessary to use language such as 'mandatory minimum tariff of fees'. A failure to use such language leads to only one conclusion -- that the legislature intended to provide only a suggested tariff -- a fee guide as it were. I can think of no special circumstances for the legislature to single out the land surveyors and to give them something none of the other professional bodies received.

This conclusion will not interfere with the Corporation's goal of regulating its members and protecting the public from improper workmanship. One can reasonably expect professional persons, having legislative approval to govern themselves, when discharging their professional duties to act professionally. This must include, almost by definition, a refusal to do cut-rate work for cut-rate prices."

Earlier in his reasons, Mr. Justice Patrick Dohm wrote:

"The Competition Act of Canada which prohibits price-fixing can play no direct part in determining whether the Land Surveyors Act provides for a minimum tariff. This was the conclusion reached in Attorney General of Canada et al v. Law Society of British Columbia; Jabour v. Law Society of British Columbia et al (1982), 137 D.L.R. (3rd) 1 (S.C.C.) wherein the court found the Combines Investigation Act. R.S.C. 1970, c. C-23 as amended (the predecessor of the Competition Act) did not apply to regulations authorized by statute and enacted by bodies created by that statute for the purpose of regulating a profession. Put another way, even if the Land Surveyors Act provided for a minimum tariff of fees, the federal legislation prohibiting such activity has no application."

The Corporation did not appeal the Mortimer case.

We, of course, then received a letter from the "surveyors"' solicitor asking how the "Corporation" was going to deal with his client, in light of the decision in the Mortimer case.

In short, after long arguments over what costs would be paid, we consented to an order allowing the "surveyors"' appeal, quashing his conviction, and allowing him costs on a party/party basis for the appeal only. We have, to date, not received a statement of costs, however, the order has been filed.

You will recall that earlier I indicated that the solicitor for the "surveyors" had contacted the Competition Bureau.

The Corporation received a letter, dated June 15, 1989, from the Acting Director of Investigation and Research of the Bureau of Competition Policy. He

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knew about the details of the Mortimer case and the decision rendered therein. In his letter, the acting director states:

> *"In light of the Courts determination in this matter, it is the view of the Director of Investigation and Research that the Corporation's activities with respect to the formulation and enforcement of a minimum tariff of fees fall within the scope of the Competition Act and may raise serious competition concerns."*

On the basis of information and the Mortimer decision, he went on to state that the Corporation and its Executive, in agreeing to act in such a concerted manner, may have committed an offence under the conspiracy provision and that the Director is obliged by Section 10 to commence an inquiry.

He further stated:

> *"As part of the inquiry process, the possibility of resolving a matter through a compliance oriented approach is usually examined."*

The President, myself as then Vice-President, the Secretary and our solicitor met with Mr. James Bocking on July 8, 1989. He was accompanied by Mr. John Pecman and Ms. Janet Johnston, counsel to the Director. During the meeting, it was suggested, by Mr. Bocking, that, although criminal charges were possible, he would propose a consent order forcing the "Corporation" to adhere to certain guidelines as laid down by the Competition Bureau. He also mentioned that his office was holding discussions with the Association of Ontario Land Surveyors.

In our discussions with him, he indicated that he would be proposing that we would not publish even a suggested fee schedule nor would we restrict advertising. Further, suggestions were made that the order would require reporting to the Director of Investigation and Research.

During the meeting, Mr. Bocking agreed to speak to our members at our Annual General Meeting, however, he did not respond to our persistent requests for confirmation. In the end, he did not attend.

Since that meeting, our solicitor has written to the Ministry of Attorney General of British Columbia and has expressed concern as to what we view to be, undue interference and harassment by the Competition Bureau. The Attorney General was asked whether or not this is a matter in which he feels there is sufficient concern to intervene.

We received a reply dated November 8, 1989 and the support of the Ministry of Attorney General is very clear. The Province continues to support the proposition that industries and professions subject to provincial regulation should enjoy the benefit of the "regulated industry" exception to the application of the Competition Act. We are very hopeful that the Province will intervene on our behalf should an action be commenced by the Competition Bureau.

Our position is that the Competition Bureau has no authority to interfere with or regulate the conduct of a professional body which exists by virtue of provincial legislation. Not only did Mr. Justice Dohm state, in his decision, that the Competition Act has no application, but there is further support arising from the decision, on appeal, of the Jabour case, to which I referred earlier. This case involved a lawyer in British Columbia some years ago. In that case, the Province intervened on behalf of the Law Society.

As you may know, the Canadian Council of Land Surveyors decided in January to approach the Federal Government and request a Royal Commission inquiry into the professions and their treatment by the Competition Bureau. I want to make it very clear that the Board of Management of the Corporation of Land Surveyors of the Province of British Columbia does not support the idea of a Royal Commission inquiry in any way.

As I said before, we believe that jurisdiction over professional bodies properly lies with the Provinces and that the Federal Government should not be asked to investigate or inquire into matters pertaining to the professions.

I can tell you that, at this time, we have not received a proposed consent order, but if we do, I think you can guess what my reaction will be. I think the position of the Board might be quite similar to mine.

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